

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

City of Brockton Retirement
System et al.

v.

Civil No. 09-cv-554-JL

CVS Caremark Corporation et al.

PROCEDURAL ORDER

This action, alleging a number of fraudulent statements and omissions in violation of § 10(b) of the Exchange Act, [15 U.S.C. § 78j\(b\)](#), and SEC Rule 10b-5, [17 C.F.R. § 240.10b-5](#), was recently transferred to this court, which immediately began consideration of the defendants' motion to dismiss for failure to state a claim, see [Fed. R. Civ. P. 12\(b\)\(6\)](#). That motion raises, among other issues, (1) whether the defendants had a duty to disclose the risks of losing customer contracts when, according to the defendants, those losses were not "substantially certain" to occur, and (2) whether the plaintiffs have sufficiently alleged facts plausibly suggesting that the defendants acted with the requisite level of scienter.

Just today, however, the Supreme Court issued an opinion that would appear to guide this court's consideration of both of these issues. [Matrixx Initiatives, Inc. v. Siracusano](#), ___ S. Ct. ___, 2011 WL 977060, No. 09-1156 (Mar. 22, 2011). And just

last week, the court of appeals issued an opinion that would appear to guide this court's consideration of the first issue. [Anima S.G.P.R.A. v. Gozani](#), ___ F.3d ___, 2011 WL 924242, No. 10-1048 (1st Cir. Mar. 18, 2010). Obviously, the parties have not addressed either of these cases in the briefing on the motion to dismiss--but the court considers it essential to have the benefit of the parties' positions on these decisions in ruling on the motion.

Accordingly, the defendants' motion to dismiss (document no. 34) is denied **WITHOUT PREJUDICE** to reinstatement upon the parties' submission of a supplemental memoranda addressing the impact (if any) of the [Matrixx](#) and [Anima](#) decisions. The defendants' memorandum, not to exceed 20 pages, shall be filed on or before **April 29, 2011**. The plaintiffs shall file a response to the defendants' memorandum, also not to exceed 20 pages, on or before **May 13, 2010**. Upon receipt of these supplemental memoranda, the motion to dismiss will be automatically reinstated (i.e., it need not be refiled) and the court will decide it in the ordinary course. Nothing in this order should be construed as expressing any view as to the merits of the motion to dismiss, whether in light of the [Matrixx](#) and [Anima](#) decisions or otherwise.

SO ORDERED.



Joseph N. Laplante
United States District Judge

Dated: March 22, 2011

cc: Barry J. Kusinitz, Esq.
David A. Rosenfeld, Esq.
Deborah R. Gross, Esq.
Robert M. Rothman, Esq.
William R. Grimm, Esq.
Edmund Polubinski, III, Esq.
Jessica Kate Foschi, Esq.
Lawrence Portnoy, Esq.
Mitchell R. Edwards, Esq.
Joseph A. Fonti, Esq.